

**U.S. Department of Labor**

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**Issue Date: 11 December 2003**

Case No: **2002-LHC-2166**

OWCP No: **5-113055**

In the matter of

**KIRK D. STEWART,**  
Claimant,

v.

**JEMM INDUSTRIES /  
SIGNAL ADMINISTRATION  
c/o F.A. RICHARD & ASSOCIATES,**  
Employer/Carrier

**Decision and Order Denying Employer's Motion for Reconsideration**

This proceeding arises out of a claim filed under the provisions of the Longshore and Harbor Workers Compensation Act (the "Act"), as amended, 33 U.S.C. § 901 et seq. This proceeding arises out of a claim filed by Kirk D. Stewart ("Claimant") against JEMM Industries ("Employer").

A Supplemental Decision and Order was issued on November 14, 2003 awarding Mr. Camden, Counsel for the Claimant, \$2,860.00 for services and costs in this case.

On November 26, 2003, Employer filed a Motion for Reconsideration regarding the Supplemental Decision and Order. Employer requests that this Court revisit the issues addressed in awarding fees to Claimant's counsel.

Employer first argues that this Court's reliance on Caine v. Washington Metro. Area Transit Auth., 19 BRBS 180 (1986), is misplaced. The Court notes as it did in its Supplemental Decision and Order that the facts of Caine are dissimilar to those of this case. However, the language of the Board is nonetheless relevant to the issues in this case. Therefore, the Court's reasoning and reliance on Caine remains unchanged.

The Court will also like to note that the Board has recently addressed the issue of the necessity of an informal conference under Section 28(b) in Hucks v. Newport News Shipbuilding & Dry Dock Co., (Unpublished) (BRB No. 03-0168) (September 29, 2003). In Hucks, the Board

rejected an ALJ's decision to award attorney's fees under Section 28(a) of the Act, and remanded the attorney fee to be considered under Section 28(b) of the Act. More importantly, the Board addressed the employer's argument that it was not liable for claimant's attorney's fees under Section 28(b) due to the absence of an informal conference. The Board stated,

We reject employer's contention that it is not liable for claimant's attorney's fee under Section 28(b) due to the absence of an informal conference. Following the decision of the United States Court of Appeals for the Ninth Circuit in National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, 606 F.2d 875, 11 BRBS 68 (9<sup>th</sup> Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer's liability for a fee pursuant to Section 28(b). Caine v. Washington Area Metropolitan Transit Authority, 19 BRBS 180 (1986); contra Pool Co. v. Cooper, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001) (Fifth Circuit holds that an informal conference is a prerequisite to fee liability under Section 28(b)). Moreover, in this case, there was no informal conference due to employer's failure to participate while the claim was before the district director. Employer did not respond to correspondence from both claimant and the district director. Claimant was therefore advised by the district director to and did in fact request the transfer of her claim to the OALJ. As employer was given the opportunity to address the claim for permanent partial disability benefits while the claim was before the district director, employer may not now rely on its non-participation to avoid liability for an attorney's fee for work reasonably required while the claim was before the administrative law judge. See generally Container Stevedoring Co. v. Director, OWCP [Gross], 935 F.2d 1544, 24 BRBS 213(CRT) (9<sup>th</sup> Cir. 1991).

Hucks, (Unpublished) (BRB No. 03-0168) (September 29, 2003). In this particular claim, and as stating in the Supplemental Decision and Order issued November 14, 2003, Claimant's counsel maintained that an informal conference was requested. In addition, Claimant's counsel indicated that it was only after a discussion with Employer's insurance carrier, who indicated that no informal resolution would be made, that Claimant's counsel requested that the case be forwarded to be heard by this Court.

Employer argues in its Motion for Reconsideration that Claimant's counsel's contentions are inaccurate. Instead, Employer argues,

Claimant's counsel made claim for additional temporary total benefits by letter of January 24, 2002. The OWCP requested medical documentation of the claimed period by letter of January 31, 2002. In response, claimant's counsel stated by letter of February 12, 2002 that no informal conference need be held and requested transmittal of the LS-18 without such conference. That is, in fact, what occurred. Thus, it is simply not the case that "employer's representatives expressed no interest in resolving the matter informally."

(Employer's Motion for Reconsideration, p. 4-5).

Claimant's counsel submitted a letter to the District Director as evidence of a conversation with the Employer. The letter, dated February 12, 2002 states,

Please be advised that I have your letter of January 31, 2002. I enclose copies of Dr. Wardell's medical reports which I thought had been forwarded on to your office since they had been sent to the employer.

I originally requested an informal conference in this matter but after discussing same further with Ms. Powell on the 5<sup>th</sup> day of February, 2002, it is apparent that there will be no resolution of this matter short of an Administrative Law Judge trial. In view of this, I enclose herewith my LS-18 on the issue of temporary total disability from November 29, 2001 to date and continuing.

(Letter from Mr. Charles S. Montagna dated February 12, 2002).

Claimant's counsel's letter requesting the District Director to transfer the claim to this Court indicated a conversation with Employer's carrier had occurred. Such a letter suggests that the reason for the request for transfer was in fact based on the discussion with Employer's representative, and not because the District Director requested additional evidence. Based on Claimant's counsel's statement that this conversation was the motivating force for withdrawing his request for an informal conference, as well as the letter to the District Director, I find Claimant's counsel was acting in the best interest of his client in forgoing an informal conference and requesting a formal hearing. Based on this evidence and the Board's decision in Hucks, coupled with the undersigned's previous analysis in the Supplemental Decision and Order, I find that the absence of an informal conference does not bar counsel's recovery of fees under Section 28(b).

Employer also argues that the fee petition lacks adequate description so as to decipher whether such tasks are necessary for the litigation. As the undersigned determined in the original order,

The report lists the date, a short description of each task, and the time expended within an appropriate degree of precision. The description of each task is clear and sufficiently specific to establish that the tasks are reasonable and related to the claim.

(Supplemental Decision and Order, p. 6). Upon reconsidering of this objection, I find the entries are sufficiently detailed.

**Order**

Therefore, Employer's Motion for Reconsideration is DENIED, and all other determinations made in the Supplemental Decision and Order remain in effect.

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RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/am  
Newport News, Virginia